(4)

No. 92-1482

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ERIC J. WEISS and ERNESTO HERNANDEZ,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

BRIEF OF PETITIONERS

EUGENE R. FIDELL
FELDESMAN, TUCKER, LEIFER, FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

ALAN B. MORRISON
(Counsel of Record)
PUBLIC CITIZEN LITIGATION GROUP
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

RONALD W. MEISTER
EATON & VAN WINKLE
600 Third Avenue
New York, NY 10016
(212) 867-0606

PHILIP D. CAVE
DWIGHT H. SULLIVAN
FRANKLIN J. FOIL
LISA M. HIGDON
NAVY-MARINE CORPS
APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

Attorneys for Petitioners

71 pp

QUESTIONS PRESENTED*

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as military trial and appellate judges, because their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms?

*All parties to this proceeding are listed in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), is reprinted as Appendix A to the Petition, Pet. App. 1a-86a. The unpublished decision of the Navy-Marine Corps Court of Military Review, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), is reprinted as Appendix B at Pet. App. 86a. The unpublished decision of the Court of Military Appeals in *United States v. Hernandez*, No. 68237/MC (C.M.A. Feb. 25, 1993), is reprinted as Appendix C at Pet. App. 88a. The unpublished decision of the Navy-Marine Corps Court of Military Review in *United States v. Hernandez*, No. 91-1821 (N.M.C.M.R. Mar. 17, 1992), is reprinted as Appendix D at Pet. App. 89a-91a. The opinion of the Court of Military Appeals in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), on which that Court relied entirely in *Weiss* in deciding the second question presented in this case, is reprinted in the Appendix to the Petition for a Writ of Certiorari in *Graf*, which is pending in this Court (No. 92-1102) ("*Graf* App.") at 1a-42a.

JURISDICTION

On December 21, 1992, the Court of Military Appeals affirmed the decision of the Navy-Marine Corps Court of Military Review in *United States v. Weiss*. On February 25, 1993, the Court of Military Appeals affirmed the decision of the Navy-Marine Corps Court of Military Review in *United States v. Hernandez*. Jurisdiction in this Court is based on 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Articles 6, 16, 26, 37 and 66, 10 U.S.C. §§ 806, 816, 826, 837, and 866 (1988), are set forth as Addendum A to this brief. Unless otherwise indicated, all references to the UCMJ are to the 1988 U.S. Code.

STATEMENT OF THE CASE

This case raises two closely related questions that go to the heart of judicial independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions and sentences. All military trial judges and almost all appellate military judges are commissioned lawyers on active duty in their services. Unlike Article III judges, and most other judges appointed under Article I, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges.

Instead, military judges are selected and appointed by the Judge Advocate General of their service, who is the senior uniformed lawyer in each armed service (other than the Coast Guard, where the position is held by the General Counsel of the Department of Transportation). As such, he is in charge of all military legal officers, who are referred to as "judge advocates," and is responsible for the overall supervision of military justice matters. *See* Uniform Code of Military Justice ("UCMJ") Art. 6(a), 10 U.S.C. § 806(a). In the Navy the work of the Judge Advocate General's Corps is assigned to six separate divisions, only three of which are involved in this case: military justice (which includes both prosecutors and defense counsel), the Navy-Marine Corps Court of Military Review, and the trial judiciary. *See* Office of the Judge Advocate General Organization Manual, JAGINST 5440.1 (1991) ("JAG ORG. Manual").[1] Because the Judge Advocates General have virtually unreviewable discretion to remove or transfer military judges, those judges lack protection if their decisions do not suit their superiors.

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[1] For the convenience of the Court, a copy of the JAG ORG. Manual, along with other documents that are not readily accessible to the Court, are being lodged with the Clerk and will be identified by "(L)" following their initial citation.

Thus, the issues before the Court are whether the method of appointment to judicial offices in the Armed Forces violates the Appointments Clause, and the lack of any fixed term for those judicial offices violates the Due Process Clause of the Fifth Amendment.

1. *Institutional Framework*.

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five judges appointed from civilian life by the President with the advice and consent of the Senate for fixed terms of fifteen years. UCMJ Art. 142, 10 U.S.C.A. § 942 (West Supp. 1993). The appointment and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force, Coast Guard, and Navy-Marine Corps. Presently, there are 31 full-time appellate military judges, who may be either military officers or civilians and are appointed by the Judge Advocate General of their service. The Chief Judge of the Navy-Marine Corps Court of Military Review, which decided petitioners' cases, is chosen by the Judge Advocate General and reports directly to him. UCMJ Art. 66(a), 10 U.S.C. § 866(a); JAG ORG. Manual §109. In addition, the Navy Judge Advocate General prepares the annual fitness reports for the judges of that court, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement. Although all of the Courts of Military Review are permanent courts, located in the Washington D.C. area, none of the judges is appointed to a fixed term of office.

Nine appellate judges, all military officers, sit on the Navy-Marine Corps Court, but most cases, like petitioners', are decided by three-member panels. The Navy-Marine Corps Court, like those of the other services, has detailed rules to manage and regulate its docket and the attorneys who practice before it. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which

a death sentence, confinement of one year or more, or any type of punitive separation from the military is adjudged. UCMJ Art. 66(b), 10 U.S.C. § 866(b).

At the trial level, military judges preside over both special and general courts-martial.[2] Trial judges must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, the Judge Advocate General of their service selects and appoints them as judges in accordance with criteria set by Congress. UCMJ Art. 26(a)-(c), 10 U.S.C. § 826(a)-(c). Like the appellate judges, trial judges have no fixed terms of office. *Id*. Naval trial judges are assigned to a circuit and are supervised by a Circuit Chief Judge, who reports to and is supervised by the Chief Judge of the Navy-Marine Corps Trial Judiciary, who reports to the Judge Advocate General. JAG ORG. Manual § 110.

Each armed force assigns military judges as and when it sees fit. Judges often serve terms of two, three, or four years, but a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force. The Judge Advocate General does not issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls duty assignments. *See* UCMJ Art. 6, 10 U.S.C. § 806.

A court-martial can try any offense committed by a member of the armed services regardless of when or where it took place or who the victim was -- the sole requirement is that the accused was on active duty in the military at the time

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[2] Currently, there are 74 judges from all of the services who are certified to preside at general courts-martial. The Navy has an additional 17 judges who are qualified to preside only at special courts-martial, and there are 6 to 8 Coast Guard law specialists who are certified for special courts-martial, but are not now serving in judicial billets. Together they represent approximately 3% of all judge advocates on active duty.

of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or a term of years, total forfeiture of pay and allowances, reductions in pay grade, and a dishonorable or bad-conduct discharge (or dismissal for officers). UCMJ Art. 18, 10 U.S.C. § 818. A bad-conduct or dishonorable discharge is a badge of dishonor for life and can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Hodges*, 22 M.J. 260, 263 (C.M.A. 1986). Special courts-martial may impose up to six months of confinement, forfeiture of up to two-thirds pay per month for six months, reductions in pay grade, and a bad-conduct discharge. UCMJ Art. 19, 10 U.S.C. § 819.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over federal civilian criminal trials. The drafters of the UCMJ wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. at 465, *Graf* App 38a. The military trial judge has far-ranging discretionary powers including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [of the court-martial panel] on questions of law and procedure which may arise," and to "exercise contempt power." UCMJ Art. 48, 10 U.S.C. § 848. Most significantly, since 1968, with the consent of the accused, military trial judges can sit without a court-martial panel and try a case just as a district judge would do. UCMJ Art. 16(1)(B), 10 U.S.C. § 816(1)(B), added by the Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335. In one respect the court-martial judge has even more discretion than does a district judge: he is not bound by the Federal Sentencing Guidelines. *See* 18 U.S.C. § 3551(a); Manual for Courts-Martial, United States, 1984 (the "Manual"), Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" UCMJ Art. 66(c), 10 U.S.C. § 866(c).

2. *Proceedings Below.*

Petitioner Eric Weiss plead guilty in a bench trial before the Honorable E. F. Pesik, sitting as a special court-martial. At the time of trial, Judge Pesik was a major in the Marine Corps, and was a general court-martial certified judge. Weiss was found guilty of larceny (shoplifting of a $9.00 racquetball glove) and was sentenced to three months of confinement, forfeiture of $1395 in pay, and separation from the service with a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed in an unpublished opinion. Pet App. 86a.

Petitioner Ernesto Hernandez plead guilty to possession, importation, and distribution of cocaine before the Honorable H. K. Jowers, Jr., sitting as a general court-martial. At the time Judge Jowers was a colonel in the Marine Corps and Chief Judge of the Mid-South Judicial Circuit. This was Hernandez' first offense, he had an otherwise good record, and he had cooperated with the authorities. Nonetheless, he was sentenced to 25 years of confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and separation from the service with a dishonorable discharge. On appeal, the Navy-Marine Corps Court of Military Review affirmed in an unpublished opinion. Pet. App. 89a.

In *Weiss* the Court of Military Appeals agreed to consider whether the manner in which military trial and

appellate judges are appointed violates the Appointments Clause, and whether failure to appoint those judges to fixed terms of office denies an accused liberty without due process. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion in *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), rejecting the due process claim. Then, on December 24, 1992, a sharply divided court rejected Weiss's Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision. Hernandez' case was affirmed on February 25, 1993, based on *Weiss*. Pet. App. 88a.

In order to garner three votes in *Weiss*, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. Pet. App. 5a.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers" became "Military Judges" in the Military Justice Act of 1968, and thus no new appointment was necessary. Pet. App. 9a. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" *Id*. at. 8a.

Judge Crawford eschewed the opinion of Judge Gierke and, writing for herself, concurred only in the result. She

decided that the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the armed forces. Pet. App. 22a. Her opinion does not mention *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), in which this Court held that no class or type of officer is excluded from the Appointments Clause because of the special nature of the office or the plenary power of Congress over the subject area. Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position both in its brief and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption from the strictures of the Appointments Clause based on the judges' status as military officers or military lawyers. Pet. App. 37a, 74a. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. Pet. App. 58a (italics in orginal). He recognized that what had occurred was no mere transfer of duties, but a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," *i.e.*, to the duties of all judge advocates from whose ranks military judges are chosen. Pet App. 83a.

The *Weiss* court did not revisit *Graf*, where it had overruled a due process objection to the lack of fixed terms of office for military judges. *Graf* had first rejected the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which this Court had used to resolve Fifth Amendment due process claims. *Graf* App. 29a. Instead, it used the seemingly less exacting standard enunciated in

Medina v. California, 112 S. Ct. 2572 (1992), which involved review of a burden of proof issue in a state criminal case. Second, *Graf* treated *dicta* from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office for judges. *Graf* App. at 34a-35a. It then announced a new rule that military judges could not be removed in retaliation for their judicial decisions, without explaining how that rule would work in practice, let alone how it would protect an accused, rather than a military judge. *Id.* at 38a. Nowhere did the Court of Military Appeals (nor did respondent in its opposition to certiorari in *Graf*) suggest that military necessity precludes fixed terms for military judges in peacetime.

SUMMARY OF ARGUMENT

There is no dispute that those who serve as military judges must be appointed in accordance with the Appointments Clause. Nor is there any doubt that those who now serve as military judges do not have a separate appointment under that Clause for those offices. Thus, unless their prior appointments as military officers suffice to enable them to perform the duties of military trial or appellate judges, the Appointments Clause has been violated.

Both respondent and the Court of Military Appeals have placed almost total reliance on this Court's 100 year-old decision in *Shoemaker v. United States*, 147 U.S. 282 (1893), where the Court rejected an Appointments Clause challenge to the assignment of additional closely-related, short-term duties to two existing offices. However, *Shoemaker* deals primarily with the one-time problem of adding duties to existing offices. Thus, it might have been relevant had a challenge been made on Appointments Clause grounds shortly after the duties of military trial and appellate judges were expanded in 1968, and those who had been in those positions continued in office without a new appointment, but it cannot

rescue respondent 25 years after the transition problem in *Shoemaker* has disappeared.

More important, this Court's Appointment Clause jurisprudence has advanced considerably since *Shoemaker*, and now focuses on the function that the office holder is performing when deciding whether the Clause applies and whether the person is a principal or inferior officer. Applying that functional analysis here leaves no doubt that a separate appointment is required because the positions of military trial and appellate judges are separate offices, distinct from those held by military officers in general, as well as by officers who primarily do legal work. This difference is clear from the UCMJ, which requires special qualifications for military judges, and from the Navy's own rules, which require separate appointments for Navy and Marine officers who serve as trial or appellate judges. In addition, the vast powers that military judges possess confirm that the office of military judge must be filled by an appointment that satisfies the Appointments Clause, which does not include the general military appointments that are made each year to tens of thousands of military officers.

The judgments below also must be reversed on due process grounds because trial and appellate judges have no fixed term of office and may be removed or transferred at any time. No other federal officer who performs a judicial function even remotely comparable to the vast powers exercised by military judges lacks the essential protection of a fixed term of office that due process requires. Indeed, so far as we have been able to determine, every state court judge who presides over felony cases, like those that come before special or general courts-martial, has *some* term of office protection to assure his independence.

Unlike prior cases involving the military before this Court, there has been no effort to defend the lack of terms of office on grounds of military necessity. Instead, the practice has been defended on the tautological basis that military judges have never had terms of office, and hence due process

does not require them. But due process is not determined solely by reference to the past practices of the challenged institution; rather, it embraces a far wider inquiry designed to assure, at a minimum, fundamental fairness. That necessitates an inquiry into what practices others follow and the practical consequences of the existing and proposed rules. On these issues, regardless of the precise test employed, the lack of terms of office cannot stand, especially since petitioners agree that due process would not forbid transfers from judicial offices based on such exigencies as war, insurrection, or demobilizations.

Either the Appointments Clause or Due Process violation alone would require reversal, but in combination they doubly undermine the basic right to an independent judiciary before an individual can be subjected to the possibility of serious punishment of the kind that a general or special court-martial can impose. Moreover, the fact that the person who controls the appointment and removal of military judges -- the Judge Advocate General -- is not a politically accountable civilian (except in the Coast Guard), and is, for all services, the head of its military justice system, greatly exacerbates the unfairness to the accused of the present system.

ARGUMENT
THE JUDGMENTS BELOW SHOULD BE REVERSED.

I. Military Trial and Appellate Judges Are Not Appointed By the Method Required by the Appointments Clause.

A. The Text and Purpose of the Appointments Clause Directly Supports Petitioners.

The Appointments Clause to the Constitution, Article II, § 2, Cl. 2, provides the exclusive method for the appointment of officers of the United States. Nonetheless, Judge Crawford, who cast the deciding vote in favor of respondent below, concluded that the Appointments Clause

does not apply to officers in the Armed Services, a view which the Solicitor General has refused to embrace both below and in his opposition to this petition. Moreover, as this Court observed in *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), "no class or type of officer is excluded [from the Appointments Clause] because of its special functions." *See also Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs"). Accordingly, the question before the Court is not whether the Appointments Clause applies, but whether it is satisfied by the current statutory scheme.

This Court has considered the Appointments Clause in a trilogy of cases beginning with *Buckley v. Valeo*. The most relevant discussion for this case is contained in *Freytag v. Commissioner*, 111 S.Ct. 2631 (1991), which involved the appointment of "special trial judges" by the United States Tax Court. There the Court observed that the Appointments Clause "not only guards against . . . encroachment [by one branch against the other], but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Id.* at 2638. It further recognized that the Clause "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint," which, the Court observed, does "not always serve the Executive's interest" because it "forbids Congress from granting the appointment power to inappropriate members of the Executive Branch." *Id.* at 2639. The beneficiaries of the Appointments Clause, said the Court, are "not those of any one branch but of the entire republic." *Id.*

The Court further explained that the intent of the Framers in limiting the appointment power was to "ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 2641. The Court went on to observe that it was the "Framers' conclusion that widely distributed appointment power subverts democratic

government" and that the Framers "recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power." *Id.* at 2642.

The Appointments Clause divides the universe of officers of the United States into two categories: principal officers, who must be appointed by the President with the advice and consent of the Senate, and other officers, referred to as "inferior Officers," who may be appointed by the President alone, the courts of law, or the heads of departments, where Congress so provides by law. There is a third category of persons employed by the Executive Branch, known as employees, who have less power than officers and who need not be chosen under one of the methods provided in the Appointments Clause. However, no one has suggested that military trial and appellate judges are mere employees, nor could such an argument plausibly be made in light of this Court's discussion of the differences between officers and employees in *Freytag*, 111 S.Ct. at 2640-41.

Normally, the first question to be asked under the Appointments Clause is whether the person is a principal or inferior officer, but, as this Court observed in *Morrison v. Olson*, 487 U.S. 654, 671 (1988), that line is "far from clear." In our view, military judges are principal officers under the test laid down in *Morrison* at 671-72. Thus, although they are subject to removal by higher Executive Branch officials (a matter raising rather than resolving constitutional questions, as we explain in Point II), they are not empowered only to perform "certain, limited duties;" they are not "limited in jurisdiction" except in the sense that all judges are so limited; and they are not "limited in tenure" as the Court used the term in *Morrison* to mean "appointed essentially to accomplish a single task." *Id.* Military appellate judges are the paradigm of principal officers since they are required to act independently, and their decisions are rarely reviewed in the Court of Military Appeals. While the decisions of military trial judges are subject to review by the

higher courts, that is also true for the rulings of the Tax Court. Nonetheless, in *Freytag*, this Court concluded that Tax Court judges were, in the view of the majority, members of a court of law within the Appointments Clause, or, in the view of the concurrence, members of an entity whose Chief Judge is the head of a department within that Clause. Under either approach, in order to be authorized to appoint inferior officers, judges of the Tax Court had to be principal officers, and, if they are, so are military trial judges, even if their decisions are subject to review by other judges.

Since, as we demonstrate below, the appointment of military judges does not satisfy even the inferior officer requirements, the Court need not decide the question, although Congress will be forced to face the issue if the Court strikes down the present system. Nonetheless, if military judges are principal officers, it is an even more serious transgression of the purposes of the Appointments Clause to have their original commissions substitute for an appointment to a principal office.

Even if military judges are inferior officers, their selection as judges does not satisfy the Appointments Clause. First, the Constitution requires that the method of selection of inferior officers be provided "by law," and there is no law specifically providing for any method of appointment of military judges: Congress never passed a statute specifically opting for this alternative method for appointing inferior officers, as the Constitution requires it to do. Second, apart from the absence of an applicable law, military judges are not appointed as judges by any of the methods provided for in the Appointments Clause. They are not chosen by the President or by a court of law, and their appointment by the Judge Advocate General of their Armed Service does not meet the requirement that the appointment be made by the head of a department, who in this case would be the Secretary of Defense, or, in the Coast Guard, the Secretary of Transportation. Thus, on its face, the Appointments Clause has been violated.

B. *Shoemaker* Does Not Support Respondent.

The answer of the United States and the Court of Military Appeals to this argument is not based on any language in the Appointments Clause or any other provision of the Constitution, but on a single decision of this Court, *Shoemaker v. United States*, 147 U.S. 282 (1893). Because *Shoemaker* plays such a central role in the government's claim, it is worth reviewing the facts before turning to the two paragraphs in the opinion dealing with this issue. *Shoemaker* arose under a statute that Congress passed to facilitate the creation of Rock Creek Park in Washington, D.C. In order to carry out its plan, Congress established a commission of five persons, three of whom were to be appointed by the President with the advice and consent of the Senate. The two remaining places were filled by designating the holders of two offices as *ex officio* members: the Chief Engineer of the Army and the Engineer Commissioner of the District of Columbia, both of whom had been appointed by the President with the advice and consent of the Senate. Shoemaker and others objected to the plan in part because, as neighboring landowners, they were going to be assessed to pay for the benefits to them from the new park. Therefore, they sought to prevent the plan from going forward using a wide variety of arguments, including that the two members of the Park Commission whose offices were named in the statute had not been separately appointed by the President and confirmed by the Senate for their positions as Park Commissioners. It was in the context of this effort to set aside the work of the Commission that the case reached this Court.

The Court swiftly rejected this and other challenges. As to the necessity of a second confirmation because the statute assigned new duties to existing offices, the Court concluded that

> we do not think that, because additional duties, germane to the offices already held [were added by Congress] it was necessary that [these two officers] should be again appointed by the president and confirmed by the senate. It cannot be doubted, and it has frequently been the case, that congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

147 U.S. at 301. The Court also examined the functions of the existing offices and the newly added duties and found that they "cannot fairly be said to have been dissimilar to, or outside the sphere of, their official duties." *Id.*

Before applying that germaneness analysis, as amplified by this Court's more recent Appointments Clause cases, the factual context of *Shoemaker* distinguishes it from this case for five reasons. First, the *Shoemaker* analysis has no applicability to the Courts of Military Review whose members need not be active duty officers. UCMJ Art. 66, 10 U.S.C. § 866. Thus, the two judges on the Coast Guard Court of Military Review who were civilians at the time of their appointment to that court had no prior valid "appointment" on which to rely. Since they were appointed under the same statutory scheme that applies to all other military trial and appellate judges, it is not sufficient to say, as the Court of Military Appeals did (Pet. App. 20a), that this is not a Coast Guard case.

Second, the position of Park Commissioner was expected to be temporary, and once the work of the Commission was done and Rock Creek Park established, the Commission would go out of business. Plainly, that is not the case for military judges. Third, if either of the two designated officers left his job, his replacement would be appointed by the President and confirmed by the Senate to a position which would include both the park and non-park duties. As a result, any Appointments Clause defect would last only as long as the two original *ex officio* members remained in their positions, in marked contrast to the military judge system in which the defect is perpetual.

Fourth, since the properly appointed officers constituted a majority of the Commission, the Court might have disregarded the technical defect and sustained their decisions against the challenge of those who sought to undermine the entire statute. Fifth, if the Court had ruled the other way, it would have meant that every time Congress wished to create even a temporary new entity within the Executive Branch and to include among its members persons already holding offices of the United States, it would have required each of those existing officers to appear before the Senate and be confirmed for his or her "new position." Accordingly, for all of these reasons, *Shoemaker* is readily distinguishable from this case and cannot form the basis of any widespread evasion of the Appointments Clause.

Despite these substantial differences, the two-judge plurality in the Court of Military Appeals nonetheless relied on *Shoemaker* for two related reasons. First, it claimed that there was no new office created when Congress amended the UCMJ to provide for military trial and appellate judges. Second, it found that the duties of military judges were germane to the duties of military lawyers, and hence any new duties resulting from the creation of military judges fell within *Shoemaker*. In opposing certiorari, the Solicitor General took what appears to be an even broader view: once a military officer is appointed by the President and confirmed by the Senate, that is sufficient to satisfy the Appointments Clause, regardless of what functions that officer later is called upon to perform in the military, including those of trial or appellate judges. (Opp. at 7-9).

The issue of whether Congress created a new office when it amended the UCMJ in 1968, or simply added germane duties to an existing office, need not detain the Court for long. Assuming that there were no such new office created, *Shoemaker* would simply allow the persons already serving in that office to take on new duties without being reappointed. Thus, applying *Shoemaker* to this situation would only have allowed those who had been properly

appointed as law officers prior to 1968 to continue in office until their successors were chosen, who would then have had to be properly appointed to the new office. That approach assumes that those who were serving in office in 1968 were properly appointed, a matter which this Court need not decide since there were no pre-1968 judges who sat in these cases, but it leaves open the issue of whether those who became military judges thereafter were required to be appointed under the Appointments Clause.

There is another reason why the Court of Military Appeals was in error in equating the office of military judge with that of a military officer, even one who is a judge advocate: the military itself treats these positions as separate offices. Thus, Article 26(b) of the UCMJ, 10 U.S.C. § 826(b), establishes additional criteria for military judges, which include membership in the bar of a federal court or the highest court of a state and being "certified to be qualified for duty as a military judge by the Judge Advocate General of the Armed Force of which such military judge is a member." Similarly, in 1968, when Congress replaced the Boards of Review -- the prior appellate mechanism -- it directed each Judge Advocate General to establish a separate Court of Military Review to handle the appellate functions. Furthermore, throughout the UCMJ, the Congress assigned to military judges alone many specific functions, which are discussed more fully *infra* at 22-23.

In addition, the Navy itself has recognized that military judges hold separate offices for which they are required to have separate appointments. For example, the Judge Advocate General has created a judicial screening board in JAGINST 5817.1 (L), which deals with the process of appointing military judges. In Section 4b, there is a discussion of nominations for "judicial appointments," and subsections (e) and (f) also refer to "appointments," although "assignment" is also used in those provisions. Finally, in Section 5, the Judge Advocate General makes it clear that the report of the Judicial Screening Board is advisory only and

does not affect the "statutory authority of the Judge Advocate General to make judicial *appointments*" (*emphasis added*).

Of equal significance is the fact that a separate oath of office has been held by the Court of Military Appeals to be a requisite for at least the judges of the Courts of Military Review before being entitled to perform their duties. *United States v. Elliott*, 15 M.J. 347 (C.M.A. 1983). Accordingly, the Navy-Marine Corps Court of Military Review's internal rules specifically provide that an oath must be administered before a person may perform the duties of an appellate military judge. Rule 2-5(g)(L). The Rule also prescribes the form of oath, the most pertinent provision of which reads "I, _____, having been duly appointed (the) an (Chief) appellate military judge, United States Navy-Marine Corps Court of Military Review . . .." *Id.* Similarly, Article 42(a) of the UCMJ, 10 U.S.C. § 842(a), requires an oath of office for military trial judges. We have reproduced as Addendum B to this brief form certificates used by the Navy for its trial and appellate judges, which make clear that the Judge Advocate General has "appoint[ed]" the individual to the judicial "office." Accordingly, this case involves a significant selection process by the Executive Branch, unlike *Shoemaker* where there was no such choice made, but simply an assignment by Congress of additional duties to two existing offices. Finally, the Navy has a formal screening board that makes recommendations to the Navy Judge Advocate General, who then makes the final judicial selections, a decision that he has described as "among [his] most important duties." JAGINST 5817.1, ¶ 2 (L). For those reasons, if, under *Shoemaker* the test is of whether the office of military judge is a separate office, the UCMJ, as well as the Navy itself, treat judicial offices differently from other billets held by commissioned military officers, and, therefore, that test has plainly been met

C. The Court's Functional Analysis in Appointments Clauses Cases Supports Petitioners.

Other relevant legal authority confirms that the attempt to shoehorn the facts of this case into the *Shoemaker* mold cannot succeed. Beyond the few words relating to germaneness in *Shoemaker*, there are no cases dealing directly with the question presented here. However, this Court's recent Appointments Clause jurisprudence has focused on the function of the person in determining whether there is an office of the United States that requires compliance with the Appointments Clause, and if so, whether the occupant is a principal or inferior officer. *Buckley v. Valeo*, 424 U.S. at 137-41; *Morrison v. Olson*, 487 U.S. at 671-72; and *Freytag v. Commissioner*, 111 S.Ct. at 2640-41. We believe that the same kind of functional analysis is the most useful way of determining whether a separate appointment is required.

The duties of the judges on the Courts of Military Review are set forth in Article 66 of the UCMJ, 10 U.S.C. § 866. Under the scheme of military justice, the Courts of Military Review are the only appellate tribunals to which most defendants have access, since review in the Court of Military Appeals is entirely discretionary, except for death penalty cases. UCMJ Art. 67(a), 10 U.S.C. § 867(a).[3]

In at least some respects, the powers of the Courts of Military Review exceed those of the normal appellate tribunal. Thus, under Article 66(c), a court "may affirm only such findings of guilt and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines on the basis of the entire record should be approved." This power is not simply to decide whether the decision below does not contain reversible error, but whether it is, in fact, correct, in whole or in part. Moreover, these courts can

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[3] In Fiscal Year 1991, the Court of Military Appeals resolved 170 cases on the merits, in comparison to the 5,183 cases that the four Courts of Military Review decided in that time. Annual Report on Military Justice, 34 M.J. LVII, LXXVII, CV, CXIX, CXXXIII, CXLII (1991).

review not only the propriety of a conviction, but also the sentence imposed. And the next sentence in subsection (c) specifically provides that in "considering the record, the court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." As this Court is well aware, the broad power of military appellate tribunals to review factual findings made by either a court-martial panel or the military trial judge far exceeds that of any federal appellate court and most, if not all, state courts as well. In essence, military appellate judges have the final say on the guilt, as well as the appropriate punishment, for every person convicted of a crime under the UCMJ. To say that persons who perform that function are no different from every other military officer or even other judge advocates, is simply to ignore the role that appellate judges play in the system of military justice.

As for military trial judges, while their decisions are subject to review by the convening authority and by the Courts of Military Review, their powers are substantial and wholly different from those of ordinary military officers and indeed substantially different from those of the "law officers" whom they replaced after 1968. The first and most significant change in 1968 was to allow the military judge to try cases without a court-martial panel. In the approximately two-thirds of all special and general courts-martial that are tried by judges alone, *see* Note, *Military Justice and Article III*, 103 Harv. L. Rev. 1909, 1911, n.17 (1990), the military trial judge decides guilt or innocence and exercises wide discretion in imposing sentence, especially since the Federal Sentencing Guidelines do not apply to the military.

In our view, those powers alone are sufficient to make the Appointments Clause applicable to all military trial judges, but there are a number of other important duties that such judges have which further demonstrate the need for compliance with the Appointments Clause here. These additional functions include conducting hearings and deciding

motions outside the presence of court-martial members (Art. 39); granting or denying continuances (Art. 40); deciding challenges of court-martial members for cause (Art. 41(a)); holding persons in contempt (Art. 48 and Rules for Courts-Martial 801(b)(2) & 809); ruling on all questions of law (Art. 51(b)); and instructing the members of the court-martial on the applicable law (Art. 51(c)).

According to the government, despite these very significant powers assigned to military judges and despite the fact that no one else in the military is permitted by law to perform them, the original appointments of military judges as commissioned officers are sufficient to satisfy the requirements of the Appointments Clause because all military officers have some responsibility for military justice matters, and hence the assignment to perform judicial activities is germane to their normal responsibilities (Opp. at 8-9).

The germaneness argument made by the plurality in the Court of Military Appeals seemed to be limited to pre-1968 law officers or at least judge advocates, but even that limitation would still significantly undermine the purposes of the Appointments Clause. Under that theory, for example, a trial attorney at the National Labor Relations Board could become an Administrative Law Judge there or, if his or her original appointment had been by the President with the advice and consent of the Senate, a member of the Board itself, with no further need for Appointments Clause compliance. Similarly, the head of the Civil Rights Division of the Justice Department could be moved to the Antitrust or Criminal Divisions, or be made a U.S. Attorney, and the Ambassador to Israel could be sent to Saudi Arabia or Syria, with no further presidential or Senate involvement. According to the analysis of the court below, all of these transformations would have passed the germaneness test and therefore would be constitutionally permissible.

Moreover, in Article 26(c) of the UCMJ, Congress dealt with the issue of germaneness in a manner that is inconsistent with the Court of Military Appeals' approach.

That provision specifically authorizes a general court-martial judge to "perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee." This congressional recognition of the difference between general court-martial trial judges and others in the military underscores the error in treating military trial and appellate judges the same as all other judge advocates.

While the lower court seemed to limit its findings of germaneness to those serving in the law section of the military, the Solicitor General in his opposition took an even more expansive view of germaneness, under which simply being a commissioned officer is enough, for Appointments Clause purposes, to allow an officer to serve as a military trial or appellate judge. One reason why respondent may have had to take this position is that, at least for the Marine Corps, from which the two trial judges and two of the six appellate judges in these cases came, commissioned officers are not commissioned as judge advocates, but are given unrestricted commissions. This can be seen from the promotion lists for both the trial judges, which list all those to be elevated to a given rank in one group (*i.e.*, "appointed"), with no differences based on whether they serve primarily as lawyers or infantry officers, *see* 136 Cong. Rec. S6023-24 (daily ed. May 10, 1990) (Lt.Col. Pesik) and 132 Cong Rec. 8082 (1986) (Col. Jowers), unlike the other services where promotions for judge advocates are made separately. 136 Cong. Rec. at S6023 (Army).

Moreover, the Solicitor General's opposition did not respond to the hypotheticals in our petition similar to those set forth above and made no attempt to limit or define germaneness. As a result, under respondent's approach, since military officers are appointed by the President with the advice and consent of the Senate, they can be assigned to a Court of Military Review even if they were infantry officers

at the time they received their commissions. This approach is wholly inconsistent with this Court's decisions in *Buckley* and *Freytag*, or with the Court's repeated recognition that principles of separation of powers, including the Appointments Clause, are "the central guarantee of a just government." *Freytag*, 111 S.Ct. at 2634. It also contravenes the purpose of the Appointments Clause -- to prevent Congress from "dispensing power too freely" -- and disregards this Court's admonition that the Appointments Clause is intended for the benefit "of the entire Republic." *Id.* at 2639. And it undermines the goal of the Framers to assure that "those who wielded [the appointment power] were accountable to political force and the will of the people." *Id.* at 2641. In short, in place of principles of governmental accountability, respondent would substitute a mechanical "once confirmed always confirmed" approach, at least insofar as military judges are concerned.

Moreover, under the approach proposed by the government, the second appointment would not be limited to a position within the same department. Thus, a lawyer in the Internal Revenue Service could become a special trial judge of the Tax Court, and a Department of Justice prosecutor could become a federal magistrate. In addition, individuals could be transferred in or out of the military, or among the Armed Services, all without any further action under the Appointments Clause. In fact, the government's argument with respect to germaneness is made at such a high level of generality that it might well sustain anyone being transferred any place within the government so long as the appropriate level of appointment was made in the first instance, albeit many years before.

There is one other factor that further undermines the government's position here. When Congress created the Courts of Military Review, it specifically authorized civilians to be members of those courts, and two persons currently on the Coast Guard Court of Military Review were not on active duty when they were appointed, although both were retired

military officers. While this is not a Coast Guard case, the fact that civilians could have sat on the appellate panels that heard petitioners' cases, establishes that Congress never gave thought to, let alone approved, respondent's *post hoc* rationalization that equates service as a military officer with service as a military judge, so that one appointment fits all functions and positions. Since civilians serving on the Courts of Military Review plainly cannot rely on this rationale, it is also unavailable to other military judges whose appointments have not otherwise complied with the Appointments Clause.

Finally, no policy justification has been suggested by the lower courts, respondent, or Congress to justify non-compliance with the Appointments Clause. Indeed, there is no indication that Congress ever considered the matter when it created military judges in 1968 and either believed that the Appointments Clause had been satisfied or was excused for some policy reason. *But see Buckley v. Valeo*, 424 U.S. at 134 ("[F]ears, however rational, do not by themselves warrant a distortion of the Framers' work "under the Appointments Clause"). In sum, there is no basis to exclude military judges from the requirement of a separate judicial appointment that satisfies the Appointments Clause. Since petitioners were neither tried nor sentenced by properly appointed trial judges, nor were their appeals heard by properly appointed appellate judges, the judgments below must be reversed, and their cases remanded for further proceedings.

II. The Lack of Tenure for Military Trial and Appellate Judges Violates Due Process.

Introduction

The second question presented is whether the military judges who preside at special and general courts-martial, and hear appeals from them, must have some fixed term of office in order to assure the independence necessary so that due process is satisfied in the major criminal cases that those courts hear. Petitioners do not seek an inflexible rule under which no military judge can ever be transferred or removed

from office either for cause or in response to specific military needs, such as the recent deployment of troops to Somalia. Nor do they argue that a particular term of office is dictated by the Constitution. Rather, they contend that, at a minimum, due process requires fixed terms of office for military trial and appellate judges that can be altered only for reasons such as wars or major reductions in force.

Under the present federal system, the terms of office of those persons who perform adjudicative functions in the federal government fall into three categories. First, there are the Article III judges who have life-time tenure, subject only to removal by impeachment, and a guarantee against any reduction in compensation. These requirements, which are the ultimate guarantees of judicial independence, are contained in the Constitution, and petitioners do not contend that the trial and appellate judges in their cases are entitled to them, as did the defendant in *Palmore v. United States*, 411 U.S. 389 (1973).[4]

Second, a variety of other persons perform judicial or quasi-judicial functions in the federal system, and virtually all of them have terms of office, subject to removal only for good cause, which gives them substantial independence, although less than Article III judges. Thus, the judges of the Court of Military Appeals serve 15 year terms, 10 U.S.C.A. § 942 (West Supp. 1993); bankruptcy judges are appointed for 14 years, 28 U.S.C.A. § 152(b)(West Supp. 1993); magistrate judges serve for eight years, 28 U.S.C. § 631(e); tax court judges serve for 15 years, 26 U.S.C. § 7443(e); judges of the District of Columbia serve for 15 years, District

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[4] Contrary to the view of the Court of Military Appeals in *Graf*, 35 M.J. at 463-64, *Graf* App. 55a, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), also has no bearing on this case since its statement concerning the absence of a term of office for military judges was descriptive only and was offered as a reason why former servicemen could *not* be tried by a court-martial; it was not a ruling on whether that absence was consistent with due process.

of Columbia Code §§ 11-1501 and 1502; administrative law judges serve for indefinite terms, removable only for cause, and after a hearing, 5 U.S.C. §§ 3105 and 7521; territorial judges are all now appointed for terms of 10 years, 48 U.S.C. § 1424b (Guam), § 1614 (Virgin Islands), and § 1694 (Northern Mariana Islands); and the commissioners of federal regulatory agencies that perform quasi-adjudicative functions, such as the National Labor Relations Board (29 U.S.C. § 153), the Securities and Exchange Commission (15 U.S.C. § 78d), and the Federal Trade Commission (15 U.S.C. § 41), all have terms of office of five years or more.

Finally, there are those, like military trial and appellate judges, who have no terms of office, and hence their independence is always open to substantial doubt. These include special trial judges of the Tax Court, 26 U.S.C. § 7443A, and administrative judges who perform functions similar to those of administrative law judges, but do so on matters of lesser significance. The latter are civil servants who enjoy many protections, but those do not include a term of office while serving as administrative judge. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 263, 341-46 (1992).

The test for determining whether a particular protection is required by the Due Process Clauses of the Constitution was enunciated by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976):

> our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews involved the question of whether an evidentiary hearing was required prior to termination of social security disability benefits, but this Court has relied on the *Mathews* test in a variety of other contexts, including several involving federal criminal procedural questions. *United States v. Raddatz*, 447 U.S. 667, 677 (1980). Most recently in *Burns v. United States*, 111 S.Ct. 2182 (1991), the Court ruled that it was impermissible for trial judges to depart upward from sentencing guidelines without previously notifying the defendant, finding that Rule 32 of the Federal Rules of Criminal Procedure should be read to require such notice because the failure to do so might raise due process problems, citing civil, administrative, and criminal cases. *Id.* at 2187. The dissent acknowledged that due process must be met and utilized the *Mathews* test to find that it had been satisfied. *Id.* at 2192-96.

Accordingly, we begin with our analysis using the three factors outlined in *Mathews*, and then explain why the Court of Military Appeals was in error in declining to apply *Mathews* in favor of this Court's decision in *Medina v. California*, 112 S.Ct. 2572 (1992). Finally we demonstrate that, regardless of which case applies, the lack of fixed term of office violates due process because, as our Anglo-American legal tradition makes clear, it is fundamentally unfair to a person charged with a serious crime to be tried before a judge who lacks the independence that a term of office supplies.

A. The Absence of a Term of Office Violates *Mathews*.

The first *Mathews* factor -- the private interest at stake -- strongly weighs in favor of a fixed term of office. General courts-martial can order confinement up to life imprisonment

and arguably can impose the death penalty.[5] Special courts-martial can impose confinement of up to six months in prison, and both special and general courts-martial can give punitive discharges which constitute a stigma for life, as well as an end to the individual's military career. Given the awesome power of courts-martial, there can be little doubt that the first factor is very much on petitioners' side.

The second factor -- the risk of an erroneous deprivation and the probable value of the additional safeguard of a term of office -- also favors petitioners. To be sure, it is impossible to quantify the added risks from having a judge who lacks a fixed term, but there is no real dispute between the parties that a defendant in a criminal case will have less risk of an erroneous conviction or of an unfair sentence where there is a bench trial, if there is an independent judge, with a fixed term of office to back up that independence. Such independence is particularly vital given the wide areas in which military trial judges exercise discretion that is largely unreviewable. *See infra* at 38-39.

The principal argument made by the Court of Military Appeals, and adopted by the government in its opposition in *Graf*, was not that independence is not valued, nor that an accused would not be legitimately concerned about the lack of independence of military judges, but that other assurances of independence sufficed. As we demonstrate more fully *infra* at 39-41, those protections are newly created, largely illusory,

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[5] In *United States v. Curtis*, 32 M.J. 252 (C.M.A. 1991), the Court rejected a challenge to the constitutionality of the death penalty under the UCMJ based on the absence of statutory authority for the presidential Executive Order on which the death penalty provisions were based. This Court denied a petition for a writ of certiorari in *Curtis*, 112 S.Ct. 406 (1991), with Justices White and Blackmun dissenting. Under UCMJ Art. 18, 10 U.S.C. § 818, a capital case cannot be tried by a military judge alone, so that if the death penalty were to be upheld, it could only be imposed by a court-martial panel. Nonetheless, the trial would be presided over by a military trial judge and appeals heard by military appellate judges, both of whom would lack terms of office.

and are almost certainly unavailable to the accused, even if they are theoretically available to military judges who choose to exercise them. Accordingly, the second factor also supports petitioner.[6]

As to the third factor -- the governmental interest in maintaining the present system -- respondent has put forth *no* justification, military or otherwise, for not providing a fixed term of office, other than the irrelevant truism, which even the Court of Military Appeals did not adopt, that each court-martial is convened separately, and hence terms of office for judges who preside over them would be impossible. Respondent's opposition in *Graf* took the position that it need not make any showing of necessity and that the lack of fixed terms of office is constitutional simply because military judges have never had them. The government has offered no argument, let alone evidence, that any kind of fiscal or administrative burden precludes terms of office. Many military judges in fact serve regular tours of duty, but they have no assurance of doing so. Of course, the needs of the military might preclude lengthy terms of office, but that hardly justifies the absence of any term of office at all.

This case is also not like *Middendorf v. Henry*, 425 U.S. 25 (1976), where Congress had carefully considered the

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[6] There is evidence that the UCMJ does not adequately insulate judges from potential pressure. For example, a 1984 study found that 25% of military trial judges and 24% of Court of Military Review judges were aware of instances in which military judges were threatened with reassignment or actually reassigned because of their decisions. 2 Dep't of Defense, *The Military Justice Act of 1983 Advisory Commission Report* 365 (1984) (table 1). This may understate the Navy and Marine Corps reality since the integrity of the survey was compromised in a way that "may have biased the data by causing respondents to provide answers that conformed to their expectations of what Navy JAG authorities wanted to hear." *Id.* at 1374. A growing list of cases highlights the vulnerability of the military bench to improper influence. *E.g.*, *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991); *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988).

issue of whether counsel should be provided for summary courts-martial and decided not to do so because, as this Court found, counsel would extend the length of proceedings and consume undue military resources. *Id.* at 43-46. By contrast, here there is absolutely no evidence that, when Congress created the offices of military trial and appellate judges in 1968, it ever gave the issue of terms of office a moment's thought. *See* S. Rep. No. 1601 (Oct. 2, 1968), 1968 U.S. Code Cong. & Admin. News 4501, 4507-08 & 4514-15 (amending Articles 26 and 66, relating to military trial and appellate judges); H. R. Rep. No. 1481 (May 27, 1968). *Compare Rostker v. Goldberg*, 453 U.S. 57, 72-74, 79-81 (1981) (careful detailed congressional and public debate on the role of women in the military relied on to sustain men-only draft registration statute).

It is important to note how few organizational and administrative changes would be needed if fixed terms of office were the rule. Unlike most due process cases, in which the individual seeks an additional hearing, a right to cross-examine witnesses, or other safeguards not provided, fixed terms of office would not require a single alteration in the procedures for conducting of military trials and appeals. The only difference would be that those who are now serving as judges would have terms of office, instead of being subject to removal or transfer at any time. Indeed, cost, which is so often a factor relied on by the government, would almost certainly cut the other way since fewer transfers would reduce expenses to the government, not increase them.

Accordingly, applying the three-factor balancing test in *Mathews*, petitioners' rights to due process were violated by the lack of any term of office for the military trial and appellate judges who presided over their cases.

B. *Medina* Should Not be Applied in this Instance.

Instead of utilizing the *Mathews* balancing test, the Court of Military Appeals relied on this Court's decision in *Medina v. California*, which was decided after *Graf* had been argued and, as a result, was the subject only of supplemental briefing. Although this Court did not clearly spell out the differences between the two tests, *Medina* focused more on history and general levels of contemporary acceptability of a practice, rather than on the pragmatic balancing of the relevant interests in *Mathews*.

Medina was the culmination of a series of cases in which defendants in criminal cases, principally but not entirely arising in state systems, sought additional procedural safeguards through the Due Process Clause. *Medina* is typical of a group of cases in which the defendants sought to reverse state procedural rules on burden of proof, in that case on the issue of competency to stand trial. This Court rejected the defendant's efforts to apply *Mathews* in that context, relying instead on *Patterson v. New York*, 432 U.S. 197 (1977), another burden of proof case where the state placed the burden on the defendant to show extreme emotional disturbance as a partial defense to a charge of homicide.

The limited scope of the *Medina* line of cases can be seen from the views on this issue expressed by the Solicitor General in his briefs in this Court. Thus, in his brief *amicus curiae* in *Medina*, the Solicitor General discussed *Mathews* at great length, never suggesting that it was inappropriate for criminal cases in general, but simply arguing that it had not been used and should not be used for questions of burden of proof in criminal cases. Brief of the United States in No. 90-8370 at 18-26, and 19. Similarly in *Burns v. United States*, the government did not argue that *Mathews* was inapplicable, but only that its test "does not dictate a different result." Brief of United States in No. 89-7260, at 10-11. Therefore, the holding in *Medina*, that the state could constitutionally assign the defendant the burden of proof on mental competency to stand trial, was not a break from the

Court's prior reluctance to overturn similar rules on due process grounds.

What was new was the seemingly broad assertion that *Mathews* does "not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process." 112 S.Ct. at 2576. In assessing the effect of this statement beyond *Medina*-type cases, it is noteworthy that in *Medina* neither the brief of the United States, nor that of any other party, urged the abandonment of *Mathews* as a general proposition or as applied to federal criminal law. And Justices O'Connor and Souter specifically urged the retention of *Mathews* as a "useful guide in due process cases." *Id.* at 2582.

Under these circumstances, we believe that the decision in *Medina* not to apply *Mathews* should be read as governing only those cases involving attempts to impose due process requirements through altering the burden of proof to favor the defendant, rather than as a general repudiation of *Mathews'* applicability in criminal matters. No member of this Court has suggested that all burdens of proof are exempt from due process challenges or has proposed repudiating *In re Winship*, 397 U.S. 358, 364 (1970), where the Court "explicitly" held that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Indeed, last term in *Herrera v. Collins*, 113 S.Ct. 853, 859 (1993), this Court specifically reaffirmed *Winship*, while relying on *Medina* to find that there was no due process right to a new trial eight years after a conviction. Similarly, it also rejected a procedural due process objection to a state statute, relying on both *Mathews* and *Medina* within three paragraphs of each

other. *Heller v. Doe*, ___U.S. __, 61 U.S.L.W. 4728, 4733 (1993).[7]

For these reasons, *Medina* is distinguishable, and its language should not be construed to apply to the issue of judicial terms of office. To the extent that it can be read as the Court of Military Appeals did -- to make *Mathews* inapplicable to all criminal proceedings, state and federal -- the Court should reconsider that language since it was neither essential to the holding in *Medina*, nor argued there.

Finally, we cannot but note the irony of applying a less stringent standard to due process issues involving defendants tried by court-martial than the standards set forth in *Mathews*. *Mathews* was, after all, a case in which the right at stake was to an evidentiary hearing before social security disability payments were cut off. There was no question whether the individual would ultimately be entitled to such a hearing; the only question was when that would occur. In that context, this Court set forth a standard which the Court of Military Appeals and the government now say is too stringent to apply when the question is not simply when a hearing will take place, but whether trials and appeals in serious criminal cases will be measured by a due process standard less rigorous than in social security cases. Neither common sense nor any aspect of due process jurisprudence suggests such a difference in treatment, and, indeed, if greater protection is needed, it is plainly in this case, where a

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[7] Another group of cases in which the Court has been reluctant to rely on due process are those in which the defendant attempted to expand a right specifically protected by the Constitution. *See United States v. Lovasco*, 431 U.S. 783 (1977) (Speedy Trial Clause in Sixth Amendment); *Dowling v. United States*, 493 U.S. 342 (1990) (attempted expansion of Double Jeopardy Clause). That line of cases might apply if petitioners were seeking life tenure for military judges, but they obviously have no applicability to the far different question of whether the lack of any fixed term of office satisfies the standards of due process.

fundamental structural defect is at issue, rather than in government benefit cases like *Mathews*.

C. Regardless of the Standard, Due Process Has Not Been Satisfied.

Even if the right to have a judge with a term of office is a "procedural rule" or a "matter of criminal procedure and . . . criminal process" within the meaning of *Medina*, 112 S.Ct at 2576, 2577, nothing in *Medina* produces a different outcome here. At the outset we note that *Medina*'s willingness to give "substantial deference" was to "considered legislative judgments," *id*. at 2577, but in this instance, Congress made no judgment at all that terms of office are unsuitable. Thus, it did not include a specific prohibition against fixed terms in the UCMJ, or even by making clear its intention in the committee reports that it had ruled out fixed terms. Although the Court in *Medina* granted substantial deference to the state's judgment, it did not simply accept the rule, but instead considered a number of factors, including historical practice, the operation of the rule, judicial precedents, and contemporary practice, at least where there is a settled view, in determining whether the fundamental fairness required by the Due Process Clause had been met. *Id*. at 2577-78.

In applying that analysis, we begin with the purpose of a fixed term of office, which is to assure the independence needed to guarantee a fair adjudication. No one doubts the need for independence, nor that tenure in office is directly related to it. As this Court stated in *United States v. Will*, 449 U.S. 200, 218 (1980), "control over the tenure and compensation of judges is incompatible with a truly independent judiciary, free of improper influence from forces within government." *See generally id*. at 217-21. Justice Frankfurter in *Wiener v. United States*, 357 U.S. 349, 356 (1958), referred to the lack of a term of office as "the Damocles' sword of removal by the President," and the plurality opinion in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982), stated that judicial

independence must be "jealously guarded," in that case through the "clear institutional protections for that independence" contained in Article III. And, as this Court observed in *In re Murchison*, 349 U.S. 133, 136 (1953), a "fair trial in a fair tribunal is a basic requirement of due process" which involves not simply the absence of actual bias but "even the probability of unfairness." *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (independent tribunal guards against "unjustified or mistaken deprivations" and "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeeding in which he may present his case with assurance that the arbiter is not predisposed to find against him"). That independence is threatened here because of the lack of a term of office, which can mean either loss of the right to be a judge, through decertification, or the transfer to another less desirable position. These kinds of potential "punishments" for conduct of which the government disapproves is precisely the kind of Sword of Damocles found disqualifying in *Wiener* and *Bowsher v. Synar*, 478 U.S. 714, 730-32 (1986).

Moreover, in assessing the potential for loss of independence, it cannot be overlooked that the persons with the power of removal or transfer are hardly disinterested bystanders. This is not a situation like those in which social security benefits are being handed out, or like cases before the NLRB, in which the Board is principally a referee between the competing parties with no real stake in the outcome. By contrast, a court-martial is convened by the military authorities, in the name of the United States, against the accused, because the accused is believed to have violated the UCMJ and should be punished for it. As this Court observed in *Middendorf v. Henry*, 425 U.S. at 46, the business of the military is to fight wars and not to try cases, and it is undoubtedly with this recognition in mind that Congress has included a number of provisions in the UCMJ designed to avoid the effect of command influence, a goal which the

"rigid structure of military authority makes . . . very difficult" to achieve. *Harvard Note*, *supra*, 103 Harv. L. Rev. at 1921. It is against this hierarchical military background that the question of fundamental fairness from the lack of terms of office must be analyzed.

We first examine the need for independence for military appellate judges. As noted in Point I, they have the power to review all factual and legal findings, including the power to overturn convictions and adjust sentences. The Courts of Military Review are the only mandatory review available to most persons convicted by a court-martial, and the Court of Military Appeals hears only about 170 cases per year, compared to the more than 5000 decided by all the Courts of Military Review. In the military system, it is the judges of the Courts of Military Review whose job it is to ensure that a trial was fairly conducted, yet without fixed terms of office, there is a substantial chance that their independence will be compromised.

The necessity for independence for trial judges is different, but perhaps even more compelling than for appellate judges because trial judges act alone. Appeals judges have strength in numbers; if they can persuade others to join them in an opinion, it is more difficult to retaliate against them. Even those who dissent are only a minority, and their actions have not overturned a conviction or reduced a sentence. But a trial judge who favors the accused is exposed, with no other judicial cover, and thereby becomes a candidate for an early, less favorable non-judicial assignment. *See* William H. Rehnquist, *Grand Inquests* 114-15, 125 (1992).

Independence for military trial judges is also important because so many of their rulings are highly discretionary and not subject to any meaningful appellate review. Running from matters such as whether to grant a continuance, to ruling on motions to suppress, to making factual findings at trials, to instructing the members of the court-martial panel, to ruling on such questions of evidence as whether there is undue prejudice from certain testimony, or whether to allow

additional cross-examination or further witnesses on the same subject, to the length and type of sentence imposed where the case is being tried by a judge alone, the military trial judge has enormous and largely unreviewable powers that make independence essential for a fair trial. No one seriously disputes the importance or practical unreviewability of most of these rulings. Yet a judge who lacks independence will be influenced, perhaps only subconsciously, to rule in a manner that will please those who can remove him from his judicial office.

The principal response by the Court of Military Appeals was not to downplay the importance of independence, but to suggest that means other than terms of office would satisfy due process. 35 M.J. at 450, 463, *Graf* App. 34a. That approach, which respondent embraced in its opposition to certiorari in *Graf* (at 9-10), is fundamentally flawed for several reasons. Among the safeguards cited were Article 6a of the UCMJ, 10 U.S.C. § 806a, which deals with "the investigation and disposition of charges, allegations or information pertaining to the fitness of a military judge or military appellate judge to perform the duties of the judge's position." At best, that provision enables a military judge to obtain a hearing when he or she has been decertified as a judge, but it does nothing to prevent the far more common and subtle practice of punishing or rewarding judicial conduct by seemingly routine transfer orders. Nor does Article 98(1) of the UCMJ, 10 U.S.C. § 898(1), which makes it a crime to "knowingly and intentionally [fail] to enforce or comply with any provision of the [code] regulating the proceedings before, during, or after trial" afford any protection against the chilling effect of a lack of fixed terms. That provision has been aptly described as a "dead letter," Homer Moyer, *Justice and the Military*, § 3-361 at 780 (1972), and /is no more of a protection than are the proscriptions against command influence in Article 37, 10 U.S.C. § 837.

There are a number of other problems with the "safeguards" suggested by the Court of Military Appeals, but

there are two over-arching objections that conclusively establish their inadequacy. First, they depend on a military judge who is willing to come forward and charge improper conduct by his military superiors. Except in the most extraordinary of circumstances, that is a wholly unrealistic suggestion, but even if it were not, it would not deal with the much more pervasive and intractable problem, where the military judge is unaware that his or her specific decisions have been affected by the prospect of punishment or reward that the lack of fixed terms fosters.[8]

Second, and most significantly, those purported protections are designed to assist the judge who wishes to protest improper conduct by others. They do nothing to protect the accused who believes that the judge, willingly or unwillingly, has surrendered his independence in order to please his superiors. Whether there is ever any actual retaliation, whether the fear of retaliation is legitimate, and what percentage of military judges have those fears are not controlling or perhaps even relevant to the requirements of due process. The question before this Court is not whether particular military judges in particular cases have sufficiently lost their independence to deny a military accused the right to

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[8] The concerns that judges in the military system have are illustrated by an ethics inquiry from the Chief Judge of the Court of Military Appeals, whose members are appointed for 15 year terms by the President, to Circuit Judge Walter Stapleton, the Chair of the Judicial Ethics Committee of the Judicial Conference of the United States. The request was for advice about whether a sitting judge, who wished to be reappointed, should recuse herself from a case that was important to the Defense Department, which makes reappointment recommendations to the President. The correspondence, which is set forth in Addendum C to this brief, is less startling for the advice given -- recusal is advisable -- than for the fact that even the judges in the Court of Military Appeals should feel the pressure of command influence, thus raising the question of whether ordinary military judges, who have no term of office whatever, can ever "hold the balance nice, clear, and true" between the accused and the prosecution. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

due process. Rather the question is the more general one, whether the absence of fixed terms of office violates due process, and on that, this Court's words in *Bowsher v. Synar, supra*, 478 U.S. at 730, albeit in a different context, are fully applicable here: "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."

Respondent and the Court of Military Appeals also relied on the fact that judges in the United States or English military in 1791 never had terms of office, and hence due process does not require them. There are several responses to this position, the most important being that, if history were the sole criterion, the role for the Court would be solely to determine the past. To be sure, history plays a part in this inquiry, but nowhere near the decisive one that respondent and the Court of Military Appeals seemed to suggest, particularly for broad concepts like due process of law. This Court's admonition in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934) -- that the proposition that "the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them . . . carries its own refutation," -- is still good law, as evidenced by this Court's decision in *Herrera v. Collins*, 113 S.Ct. 853 (1993), where it examined a number of factors besides the historical record in deciding what due process required. It would be particularly inappropriate to lock in our concepts of due process for the military to what has transpired in the past since there is no prior analog to the post-1968 military judge.

Another defect in this approach is that the history relied on has been limited to military history, with no consideration given to the fact that the federal government, through Article III and various statutes, has preserved the independence of those who perform judicial or quasi-judicial functions outside the military by providing them either life tenure or substantial fixed terms of office. Thus, magistrate judges, bankruptcy judges, tax court judges, territorial judges,

members of independent regulatory commissions, and even administrative law judges all have terms of office, even though their powers are much less than those of military judges. Indeed, in concluding that administrative law judges were entitled to absolute immunity from suits for constitutional torts, this Court specifically relied on "the importance of preserving the independent judgment of these men and women." *Butz v. Economou*, 438 U.S. 478, 514 (1978). Surely, the judgment of military judges is entitled to no less.

As the briefs *amicus curiae* of the American Civil Liberties Union and of the United States Air Force Appellate Defense Division explain in detail, the tradition of life tenure or substantial terms of offices for judges is a long and venerable one in England, in the federal system, and in the states. Today, the virtually unanimous pattern is for state judges to enjoy either life tenure, tenure until a stated retirement age, or fixed terms of years. Daniel J. Meador, *American Courts* 91-97 (1991); National Center for State Courts, Conference of State Court Administrators, *State Court Organization* (1987); *see also* American Bar Ass'n, *Standards Relating to Court Organization* § 1.13 ("judges of each level of the appellate court system should serve therein on the basis of a permanent appointment or for a substantial term of years").

We know of no state in which appeals are heard, or felony cases are tried, by at-will judges. A handful of jurisdictions have trial judges who serve at the pleasure of someone else, but these rarities typically involve courts of extremely limited subject matter jurisdiction, whose judgments are subject to trial *de novo* in a court of record. *See, e.g., People v. Horan*, 556 P.2d 1217 (Colo. 1976), *cert. denied*, 431 U.S. 966 (1977). Even so, a number of state appellate courts have invalidated arrangements under which lower court judges served at the pleasure of an elective official or body. *E.g., Winter v. Coor*, 695 P.2d 1094, 1102 (Ariz. 1985); *compare Summers v. Thompson*, 764 S.W.2d 182 (Tenn.),

app. dismissed, 488 U.S. 977 (1988) (upholding retaliatory dismissal of at-will judge only because of court's limited power), *with State ex rel. Town of South Carthage v. Barrett*, 840 S.W.2d 895 (Tenn. 1992) (invalidating statute which permitted city to create municipal court with at-will judge). Thus, in contrast to *Medina*, where there was "no settled view" on the issue, 112 S.Ct. at 2578, there is unanimity that due process requires fixed terms of office for those who exercise powers comparable to those of military judges.

Petitioners recognize that there is always an argument that the military should be treated differently. Were this a case in which the military had offered specific reasons for the lack of a fixed term of office, we might have a different situation. But neither here nor in *Graf* has respondent made such a claim, nor did the Court of Military Appeals rely on military necessity in rejecting this due process challenge.

Although no military necessity defense has been raised, a few points are worthy of note about it. First, as to the Courts of Military Review, we are hard-pressed to imagine what necessity could justify any deviation from a fixed term of office. While it is conceivable that there may be some fluctuation in the number of appeals heard from time to time, that kind of problem can be handled by simply not filling vacancies when regular terms of office expire. And since all four courts sit in the Washington, D.C. area, presumably even a widespread shift in the location of military trials would not alter the geographic needs of the Courts of Military Review. In any event, there is nothing in the Due Process Clause that would preclude the military from physically relocating a group of appellate judges, either temporarily or permanently, to accommodate the needs of the military regarding the handling of appeals otherwise within the jurisdiction of a given court. In short, except for a possible justification for a reduction in force following a rapid decline in appeals, we can conceive of no reason why the judges of the Courts of Military Review should not have fixed terms of office.

As for military trial judges, there are two separate questions: whether the needs of the military might require them to be transferred to another judicial billet and whether the needs of the military might require that they no longer be judges, but assume another legal, but non-judicial position before their terms of office expire. As to the transfer issue, there would plainly be no constitutional objection to a term of office provision that included an exception for the kind of situation found in Operation Desert Storm, where military judges were needed because only a few members of the Armed Forces were previously stationed there. There would also appear to be no objection to eliminating a judicial position entirely because of unexpected needs elsewhere, provided that the decision was based on neutral criteria and not used as a punishment for judicial performance. *See* 5 U.S.C. § 7521, excepting from the hearing and removal for cause requirements for administrative law judges situations involving a legitimate reduction in force. Moreover, in considering the possibility that a claim of military necessity would justify the early transfer of a military judge on an "emergency" basis to a non-judical billet, there are only 91 lawyers who are currently assigned to try general or special courts-martial, which represents less than 3% of all military lawyers.[9]

Of course, it is not the responsibility of petitioners or this Court to draft a detailed code of possible exceptions to the term of office requirement. That is a job for Congress, working with the military, who together are capable of producing rules for terms of office that are sufficiently certain to assure judicial independence, without interfering with the legitimate needs of the military. We have offered these

[9] Ironically, the Judge Advocate General of the Navy has a term of office of four years, 10 U.S.C. § 5148(b), as do his counterparts in the Air Force, 10 U.S.C. § 8037(a), and the Army, 10 U.S.C. § 3037(a), although for the Army and the Air Force the terms are explicitly made subject to early termination, but only by the President.

comments on military necessity to show that the legitimate military needs can be taken into account without the wholesale abandonment of the term of office principle. There is simply no reason to assume that requiring terms of office will bring the military to a halt, especially since Congress and the military have never attempted to provide for terms of office, while maintaining military flexibility. For all of these reasons, terms of office for all military judges are not only reasonable and feasible, but are required by the Fifth Amendment's guarantee of due process of law.

III. The Power of the Judge Advocate General to Appoint and Remove Military Judges Exacerbates Both the Appointments Clause and Due Process Objections.

In the two preceding arguments, petitioners have established that there is a violation of the Appointments Clause, and that the Due Process Clause requirement of an independent judge has not been met because of the lack of term of office for military judges, in both instances without regard to the position of the person who appoints or removes the judges. Thus, for example, our Appointments Clause argument would be the same if it were an Assistant Secretary of the Navy who made the appointment, because only the Secretary of Defense (or perhaps the Secretary of the Navy) is the head of the department under that Clause. But at least in that situation, the person making the appointment would be a high ranking civilian who was independently nominated by the President and confirmed by the Senate for that position.[10]

But the Judge Advocate General, who actually appoints military judges, occupies a far different position. He is not

[10] Until Congress vests the power of appointment in someone other than the Secretary of Defense, the Court need not decide whether the Secretaries of the Military Departments (5 U.S.C. §102) are "heads of Departments" under the Appointments Clause, or whether only the Secretary of Defense, who represents the military in the Cabinet and whose department is listed as an Executive Department in 5 U.S.C. §101, meets that requirement. *See Freytag*, 111 S.Ct. at 2642-43 and 2658-61.

a civilian and hence is not politically accountable. Since the Navy's Judge Advocate General is a Rear Admiral, there are at least 50 admirals and Marine generals who outrank him. As a career military person, specializing in military legal matters, he lacks the breadth of perspective and political accountability found in department heads or the independence found in the courts of law. Moreover, as the head of the military justice system within his service, he will appoint those whom he believes will best carry out the goals of the military, with the inevitably greater emphasis on the needs of the Armed Forces than on the rights of the accused. In short, on the Appointments Clause issue, the fact that the appointment is made by the Judge Advocate General, rather than by the Secretary of Defense, is no mere technical violation, but is fundamentally at odds with the principle of political accountability and the "Framers' conclusion that widely distributed appointment power subverts democratic government." *Freytag*, *supra*, 111 S.Ct. at 2642.[11]

On the due process claim, the fact that it is the Judge Advocate General who can remove judges, either by transferring them to other non-judicial positions, or by decertifying them entirely as military judges, causes even greater difficulties. To be sure, the absence of a fixed term would still be a problem even if the person with the power to remove were the President (who is the only one who can remove a Judge Advocate General), the Secretary of Defense, the Secretary of the Navy, or the Chief of Naval Operations. But if the removal power were limited to one of those officials, that would substantially reduce the likelihood of such an occurrence and the resulting loss of independence, if

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[11] A predictable consequence of having appointments made by a mid-level official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is a striking lack of diversity among the judges of the Courts of Military Review. Thus, none of the 31 current appellate judges is a woman, and two of the four courts have no minority judges.

for no other reason than that their manifold other duties and their broader perspectives on the military would mean that only the most egregious cases would ever reach their desk, let alone result in an order of removal. More importantly, because the Judge Advocate General is responsible for the military justice system as a whole, and also wields the power of removal, the due process objection is greatly magnified.

The heart of the problem is found in a proposition that the military has long urged and that this Court has reiterated on a number of occasions, most recently and most clearly in *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986):

> to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps . . . The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service." *Orloff v. Willoughby* [345 U.S. 83, 92 (1953)].

No one disputes that the military justice system may operate differently from the civilian system to take into account the special needs of the military. An inevitable part of this system, which flows from the very nature of the military hierarchy, is the concern over possible command and other outside influences in courts-martial. Congress has specifically addressed this issue in several places in the UCMJ, both with respect to specific prohibitions on outside influence, Article 37(a), and in the concern that those who participate in the process either as defense counsel or members of a court-martial, Article 37(b), or as trial judges, Article 26(c) -- but not as prosecutors -- may have their fitness reports adversely affected by either their zealous representation of the accused or their rulings on the accused's behalf. *See also* Rule for Courts-Martial 104(b) (same).

Just recently, the *en banc* Navy-Marine Corps Court of Military Review agonizingly reached the conclusion that, despite the fact that the Judge Advocate General writes the fitness reports for the judges of that court, it was not a

violation of the due process rights of the accused to have those judges review his conviction. *United States v. Mitchell*, ___ M.J. ____ (NMCM 92-1933, May 24, 1993) (L). The special problem for judicial independence raised by the possibility of adverse fitness reports written by the Judge Advocate General is not before the Court, but the more general concern in *Mitchell* -- the potential for retaliatory action by the Judge Advocate General against military judges who take the defendant's side too often -- is present because of the power of the Judge Advocate General to transfer or remove any military judge at any time.

It is true that the Judge Advocate General is administratively responsible for both prosecutors and defense counsel, but no one has ever charged the Judge Advocate General with undue protection of the rights of the accused. Indeed, the special relation between the prosecutors and the Judge Advocate General can be seen from Article 67(a) of the UCMJ, 10 U.S.C. § 867(a), which provides for review of certain cases in the Court of Military Appeals. Under those provisions, an accused who wishes such review must do so by petition, based on good cause shown, whereas the Judge Advocate General can simply send the case from the Court of Military Review, and the Court must accept it. And when the Judge Advocate General forwards such a case, he "shall cause a copy of the decison of the Court of Military Review and the *order* forwarding the case to be served on the accused and on appellate defense counsel," but not on government appellate counsel. Rule for Courts-Martial 1203(c)(1) (emphasis added).

Even under *Medina*, the absence of a fixed term of office must meet the test of "fundamental fairness in operation." 112 S.Ct. at 2578. In a somewhat different context, the issue of impartiality and independence was examined in *Tumey v. Ohio*, 273 U.S. 510, 533 (1927), where Chief Justice Taft asked "might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence[?]" And in *Withrow v. Larkin*, 421 U.S. 35, 47

(1975), the Court posed the issue as whether "under a realistic appraisal of psychological tendencies and human weakness, [the challenged practice] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Or, as this Court expressed it in *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), "it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will."

Whatever might be said for the proposition that military necessity of some kind justifies the lack of terms of office for appellate and trial judges in the Armed Services, that would not permit the decision on removal to be made by the Judge Advocate General as opposed to a higher, less interested, and more politically accountable official. Stated another way, if anyone should be allowed to transfer military judges before assigned terms of office have expired, it should be someone other than the Judge Advocate General. It is this combination of his principal role with his appointment and removal power over military judges that is so fundamentally unfair and that provides a further basis for finding a violation of the Due Process Clause of the Fifth Amendment.

Throughout this brief, petitioners have made their Appointments Clause and Due Process arguments separately. While many of the same facts are relevant to both, the legal arguments and most of the authorities are different. But in answering the ultimate question of whether courts-martial are being conducted by persons who were properly appointed and appropriately independent, the Court should not overlook that the two separate arguments are overlapping since they are both founded on the concern that the structural protections in our Constitution, which were intended to guarantee our freedoms, were not observed here. Either argument would be sufficient, but together they greatly magnify the defects in the military justice system and compound the violation of petitioners' constitutional rights.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed, and the cases remanded for further proceedings.

Respectfully submitted,

EUGENE R. FIDELL
FELDESMAN, TUCKER, LEIFER FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

ALAN B. MORRISON
(Counsel of Record)
PUBLIC CITIZEN LITIGATION GROUP
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

RONALD W. MEISTER
EATON & VAN WINKLE
600 Third Avenue
New York, NY 10016
(212) 867-0606

PHILIP D. CAVE
DWIGHT H. SULLIVAN
FRANKLIN J. FOIL
LISA M. HIGDON
NAVY-MARINE CORPS
APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

Attorneys for Petitioners

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ADDENDUM A

Relevant portions of the Uniform Code of Military Justice

UCMJ Art. 6, 10 U.S.C. § 806 Judge Advocates and legal officers

(a) The assignment for duty of judge advocates of the Army, Navy, Air Force, and Coast Guard shall be made upon the recommendation of the Judge Advocate General of the armed service of which they are members. The assignment for duty of judge advocates of the Marine Corps shall be made by direction of the Commandant of the Marine Corps. The Judge Advocate General or senior members of his staff shall make frequent in the field in supervision of the administration of military justice.

(b) Convening authorities shall at all times communicate directly with their staff judge advocates or legal officers in matters relating to the administration of military justice; and the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General.

UCMJ Art. 16, 10 U.S.C. § 816 Courts-martial classified

The three kinds of courts-martial in each of the armed forces are-

(1) general courts-martial, consisting of-

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed

only of a military judge and the military judge approves;

(2) special courts-martial, consisting of-

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

UCMJ Art. 26, 10 U.S.C. § 826 Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall

prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

UCMJ Art. 37, 10 U.S.C. § 837 Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving,or reviewing authority with respect to his judicial acts. The foregoing provisions solely for the

purpose of instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

UCMJ Art. 66, 10 U.S.C. 866

(a) Each Judge Advocate General shall establish a court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a state. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or

amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determine whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

United States Navy—Marine Corps
Court of Military Review

The Judge Advocate General

To all who shall see these presents

Greetings:

Know ye that reposing special trust in the Wisdom, Uprightness and Learning of

and by virtue of the power vested in me by an Act of the United States Congress, I do appoint him

Appellate Military Judge
United States Navy — Marine Corps Court of Military Review

and do authorize and empower him to execute and fulfill the duties of that office according to the Constitution of the United States and the Uniform Code of Military Justice, and to have and to hold the said office, with all the powers, privileges and emoluments to the same appertaining to him.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at Washington, D.C., this _____ in the year of our Lord one thousand nine hundred and _____

Rear Admiral, JAGC, U. S. Navy
The Judge Advocate General

United States Navy-Marine Corps
Trial Judiciary

The Judge Advocate General

To all who shall see these presents
Greetings:

Know ye that by virtue of the power vested in me by an Act of the United States Congress, and reposing special trust in the Wisdom, Integrity, Knowledge and Learning of

I have certified and designated the aforesaid officer

General Court-Martial Military Judge

Who is authorized and empowered to execute and fulfill the duties of that office according to the Constitution and applicable regulations, laws and statutes of the United States, and to hold the said office, with all the powers, privileges and emoluments appertaining thereto.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office at Washington, D.C. this _____ in the year of our Lord one thousand nine hundred and _____

Rear Admiral, JAGC, U. S. Navy
The Judge Advocate General

ADDENDUM C

Advisory Opinion of Judicial Conference
Committee on Codes of Conduct

June 22, 1992

To the Committee on Codes of Conduct of the Judicial Conference of the United States

Dear Judge and Committee Member:

I request an advisory opinion on a conflict of interest question that could appear before the Court on which I sit. This advice will help me devise legislation to resolve the perceived conflict. Some background information. I am the Chief Judge of the only Article I Federal appeals court. Our Judges serve a 15 year term and can be reappointed by the President with the Advice and Consent of the Senate. As you know, our jurisdiction covers criminal appeals from Federal convictions by court martial in the Armed Services. There are usually only two parties in every appeal, the appellant (servicemember) and the Government (the Department of Defense). Some of the cases we review involve the most serious Federal crimes including murder, rape, and espionage. I am told we now have nine capital murder cases in the military justice system. In each of the past two years we have handled a death penalty case. Congress has given the Chief Justice the power to designate Article III judges to sit on our Court in the event of a recusal of one of our Judges. This recusal procedure has been easily utilized several times in the last two years and with great success. Judges Sentelle, Wilkins, and Sporkin have sat with our Court using this procedure.

A serious conflict of interest in the judicial reappointment system of our Court was exposed in 1990 by the Federal Court Study Committee. The American Bar Association and other public entities have also recognized

and are concerned with this conflict of interest. In order to reduce that conflict of interest to practical application, I seek an advisory opinion of the Committee on Codes of Conduct for the following question:

> A United States Court of Military Appeals Judge (56 years old) is in the 14th year of her 15 year term appointment. The Judge is eligible and qualified for reappointment and has decided to seek reappointment. It is a matter of public knowledge that the Judge has requested the Department of Defense to reappoint her pursuant to [10 USC § 942]. The Department of Defense has the responsibility for recommending to the President individuals to be appointed to any vacancies on the U.S. Court of Military Appeals.
>
> If the Judge is reappointed, her salary would remain at the present $137,300 level. If the Judge is not reappointed, she would receive no salary and $109,800 as an annuity. The Judge learns that one of the next month's oral argument cases is an important, high visibility case for the Department of Defense. If the Government loses, the outcome of the case may seriously undercut the Department of Defense's policy banning homosexuals serving in the military. The Judge is concerned that her pending reappointment request will be perceived as a personal bias toward the Department of Defense. Should this Judge recuse herself from sitting on this case? . . .
>
> EUGENE R. SULLIVAN

COMMITTEE ON CODES OF CONDUCT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Re: Docket No. 891 July 6, 1992

Dear Chief Judge Sullivan:

You ask our advice as to whether a judge of your court should recuse him or herself in a case involving the Department of Defense where the judge's 15-year term on the court is about to expire and the judge has made known a desire to be reappointed. You advise that, as a matter of consistent practice, reappointments to your court are made by the President only upon recommendation of the Department of Defense and that while a retired judge of your court is entitled to a pension, that pension is substantially less in amount than the salary a judge would receive as a result of a reappointment to your court. You further indicate that the judges of your court have (1) adopted the Code of Conduct for United States Judges as a source of standards of conduct for judges of your court and (2) requested our Committee to give advice regarding the application of that Code upon the request of any member of your court.

Canon 3C(1) of the Code provides that a judge should recuse in any case in which the judge's impartiality might reasonably be questioned. We believe that a litigant opposing the Department of Defense in a case before your court might reasonably question the impartiality of a judge to sit on his case when the judge is seeking the approval of the Department of Defense for the judge's reappointment. Accordingly, we would advise that Canon 3C(1) requires recusal in the situation you describe.

WALTER K. STAPLETON